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FEDERAL INSURANCE COMPANY

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

CALIFORNIA CASUALTY
INSURANCE COMPANY,

Plaintiff,

vs.

FEDERAL INSURANCE COMPANY,
DOES 1-10, ROES 1-10, AND MOES 1-
10, inclusive

Defendant.

Case No. CV 08-2701 VRW

[Assigned to the Honorable Vaughn R.
Walker]

**[PROPOSED] ORDER GRANTING
MOTION OF FEDERAL
INSURANCE COMPANY FOR
SUMMARY JUDGMENT OR, IN
THE ALTERNATIVE, SUMMARY
ADJUDICATION PURSUANT TO
FED. R. CIV. P. 56**

Date: December 11, 2008

Time: 2:30 p.m.

Ctrm: 6

[Notice of Motion and Motion for
Summary Judgment; Memorandum in
Support of Motion; Request for Judicial
Notice; and Declaration of Jeffrey
Gunchick lodged concurrently]

1 The Motion for Summary Judgment or, in the Alternative, for Summary
2 Adjudication (the “Motion”) filed by defendant Federal Insurance Company
3 (“Federal”), came on regularly for hearing on December 11, 2008 in Courtroom 6 of
4 the above-captioned Court.

5 After full consideration of the evidence and authorities submitted by, and
6 arguments of, the parties, the Court finds that there is no triable issue of material fact,
7 and the Motion is granted as follows:

8 1. Summary judgment is granted in defendant Federal’s favor and against
9 plaintiff California Casualty Insurance Company (“Plaintiff”) as to all claims alleged
10 against Federal.

11 Alternatively, Federal is entitled to summary adjudication as follows:

- 12 1. The \$256,000 portion of the \$2.5 million settlement sum paid in
13 consideration for the \$256,000 in breach-of-contract damages awarded
14 by the jury is precluded from coverage by the Policy’s Benefits Due
15 Exclusion and/or the ill-gotten gains doctrine.
- 16 2. The \$1,522,243 portion of the \$2.5 million settlement sum paid in
17 consideration for \$744,700 in negligent-selection damages and for
18 \$777,543 in nuisance damages awarded by the jury is precluded by the
19 Policy’s Pollution Exclusion.
- 20 3. The \$597,243 portion of the \$2.5 million settlement sum paid in
21 consideration for the economic damages portion of the negligent-
22 selection damages and nuisance damages awarded by the jury is
23 precluded by the Policy’s Property Exclusion.
- 24 4. The \$925,000 portion of the \$2.5 million settlement sum paid in
25 consideration for the non-economic damages portion of the negligent-
26 selection damages and nuisance damages awarded by the jury is
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precluded by the Policy's Bodily Injury and Mental or Emotional Distress Exclusion.

5. The \$146,090.47 portion of the \$2.5 million settlement sum paid in consideration for \$146,090.47 in concealment damages awarded by the jury is barred from coverage by the Fraud Exclusion and/or Section 533 of the California Insurance Code.
6. The \$225,450 portion of the \$2.5 million settlement sum paid in consideration for \$225,450 in bad faith damages awarded by the jury is barred from coverage by the Fraud Exclusion and/or Section 533 of the California Insurance Code.
7. The \$343,875.43 portion of the \$2.5 million settlement sum paid in consideration for \$343,875.43 in *Brandt* fees recoverable in the underlying action is barred from coverage by the Fraud Exclusion and/or Section 533 of the California Insurance Code.
8. The \$6,341.10 by which the \$2.5 million settlement sum exceeded the \$2,493,658.90 potentially recoverable in the underlying action is precluded from coverage by the Benefits Due Exclusion and/or the ill-gotten gains doctrine
9. Plaintiff's claim for "bad faith" is precluded, as a matter of law, by the "genuine dispute" doctrine.

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1 **IT IS THEREFORE ORDERED** that the Motion is granted and that
2 judgment in this action shall be entered in favor of Federal in accordance with the
3 matters adjudicated by the Court on the Motion.
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7 Dated: _____

The Honorable Vaughn R. Walker
United States District Court Judge

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11 Respectfully submitted by:

12 STROOCK & STROOCK & LAVAN LLP
13 MICHAEL F. PERLIS
14 ALLAN S. COHEN
15 RICHARD R. JOHNSON

16 By: /s/ Michael F. Perlis
17 Michael F. Perlis
18 Attorneys for Defendant
19 Federal Insurance Company
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